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No. 91-1030

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

PAMELA WITHROW, Warden,

Petitioner,

vs.

ROBERT ALLEN WILLIAMS, JR.

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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~~MOTION FOR LEAVE TO FILE AND~~ BRIEF AMICUS CURIAE OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. When a state court has fully and fairly considered a claim under *Miranda* v. *Arizona*, should that question be reconsidered *de novo* on federal habeas corpus?

2. Where a defendant has presented only a *Miranda* claim to the state courts, may a federal court consider a claim that the confession was actually involuntary?

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MOTION OF *AMICUS CURIAE* FOR LEAVE TO FILE BRIEF IN SUPPORT OF PETITIONER

Pursuant to Supreme Court Rule 37.3, the Criminal Justice Legal Foundation respectfully moves for leave to file the accompanying brief *amicus curiae* in support of petitioner in the above captioned case. Counsel for petitioner has consented, but counsel for respondent has effectively refused consent by failure to respond to repeated inquiries.

The interest of *amicus* is stated in the attached brief, at page 1.

In the accompanying brief, *amicus* argues that (1) the state court's application of *Miranda* v. *Arizona* need not be reviewed *de novo*; and (2) the voluntariness claims should be remanded for a proper analysis of exhaustion and procedural bar.

For the foregoing reasons, *amicus curiae* requests leave to file its brief.

June, 1992

Respectfully submitted,

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BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF) is a nonprofit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the due process protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

The present case involves a collateral attack on a final judgment based in part on a claim which invokes a mere prophylactic rule and which has already been fully and fairly litigated in the state courts. Such unnecessary attack on the finality of criminal judgments is contrary to the rights of victims and society which CJLF was formed to advance.

SUMMARY OF FACTS AND CASE

Van Hooper and Charles Stanley were murdered while sitting in Hooper's car. Both were shot multiple times at close range. *People* v. *Williams*, 429 N. W. 2d 649, 650 (Mich. App. 1988). Petitioner Williams accompanied police to the station where he was questioned. After he began to implicate himself, the police arrested him and gave him *Miranda* warnings. The state court rejected claims that he was "in custody" prior to being placed under formal arrest. *Id*., at 650-651. However, the state trial court did suppress, on state law grounds, statements taken during an excessive delay before arraignment. Respondent's Brief in Opposition 5.

The federal district court granted habeas corpus relief. It disagreed with the state court's determination of when Williams was "in custody." *Williams* v. *Withrow*, 944 F. 2d 284, 289 (CA6 1991). It also found the post-warning statements to be involuntary. *Ibid*. The Court of Appeals affirmed.

SUMMARY OF ARGUMENT

Neither the history nor the language of the habeas corpus statutes require federal courts to redetermine every question of federal constitutional law *de novo*. The older precedents are squarely against such redetermination, and recent developments have created substantial exceptions to *de novo* review. The question of whether to review an issue *de novo* should proceed issue by issue.

The application of *Miranda* v. *Arizona* should not be reviewed *de novo*. It has virtually no connection with actual innocence. It does not involve a racial minority with special need for federal protection. It is not a core constitutional right. A reasonable, good-faith application of *Miranda* should be respected as final, subject only to review in this Court on certiorari.

The voluntariness claim is either unexhausted or procedurally barred. It should be remanded.

ARGUMENT

I. The habeas statutes do not require relitigation of all constitutional claims.

The supporters of *de novo* relitigation of every constitutional claim on habeas corpus generally assert that Congress has mandated such review. See, *e.g.*, *Brown* v. *Allen*, 344 U. S. 443, 510 (1953) (opinion of Frankfurter, J.); *Stone* v. *Powell*, 428 U. S. 465, 528 (1976) (Brennan, J., dissenting). Yet Justice Frankfurter was unable to cite any authority for this remarkable proposition, and those that have followed have generally just cited Justice Frankfurter. See, *e.g.*, *Butler* v. *McKellar*, 494 U. S. 407, 428 (1990) (Brennan, J., dissenting). In reality, Congress has mandated nothing of the sort.

A. Habeas Corpus to Challenge Jurisdiction.

The writ of habeas corpus guaranteed in the Constitution is the common law writ. *Ex parte Bollman*, 4 Cranch (8 U. S.) 75, 93-95 (1807). The common law writ was simply not available to review a judgment of conviction of a crime, so long as the court which entered the conviction had jurisdiction. *Ex parte Watkins*, 3 Pet. (28 U. S.) 193, 203 (1830). The constitutional basis of the objection made no difference. See *Ex parte Watkins*, 7 Pet. (32 U. S.) 568, 574 (1833) (direct Eighth Amendment challenge to constitutionality of sentence).

The *Watkins* rule, that imprisonment is not unlawful if the court rendering judgment had jurisdiction, was in effect when Congress passed the Habeas Corpus Act of 1867. Congress authorized the writ "where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States." Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385. That

language is fully consistent with the *Watkins* rule, implying that Congress did not intend to change the grounds on which habeas corpus could be granted, but only intended to enlarge the class of persons eligible for it.

The early cases confirm that only jurisdictional defects were cognizable in state prisoner petitions under the 1867 Act. *In re Wood*, 140 U. S. 278, 286 (1891) refused to consider a claim of racial discrimination in jury selection on habeas corpus. *Wood* emphatically rejected the suggestion that the constitutional nature of the claim made a difference. *Ibid*. This holding is not the result of any hostility to the rule of *Neal* v. *Delaware*, 103 U. S. 370 (1881).[1] Justice Harlan wrote both opinions and reaffirmed *Neal* in *Wood*. See 140 U. S., at 284-285.

In *Markuson* v. *Boucher*, 175 U. S. 184, 185-186 (1899), the Supreme Court refused to consider a constitutional attack on state procedural statutes. The claim had been considered and rejected by the supreme court of the state. See *id*., at 184. "The jurisdiction is more delicate, the reason against its exercise stronger, when a single judge is invoked to reverse the decision of the highest court of a State in which the constitutional rights of a prisoner could have been claimed *and may be were rightly decided*, or, if not rightly decided, could be reviewed and redressed by a writ of error from this court." *Id*., at 187 (emphasis added). The rule of *Wood* remained in force through the 1920's. "[W]e hold, as this Court has repeatedly held, that the judgment of state courts in criminal cases will not be reviewed on habeas corpus merely because some right under the Constitution of the United States is alleged to have been denied to the person convicted." *Knewel* v. *Egan*, 268 U. S. 442, 446-447 (1925).

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1. Cf. *Duckworth* v. *Eagan*, 492 U. S. 195, 224 (1989) (Marshall, J., dissenting).

B. The Shift to Constitutional Claims.

The shift from jurisdictional to constitutional claims did not begin in state prisoner cases, but rather in federal prisoner cases. Until 1891, the Supreme Court had no general appellate jurisdiction in noncapital federal criminal cases. F. Frankfurter & J. Landis, *The Business of the Supreme Court* 109 (1928). Yet, the Supreme Court extended an effective appellate jurisdiction over the circuit courts, in a limited class of cases, through a strained interpretation of what was a "jurisdictional" defect. *Ex parte Lange*, 18 Wall. (85 U. S.) 163, 176 (1874) held that imposition of both a fine and imprisonment, under a statute authorizing only one or the other, was jurisdictional. *Ex parte Siebold*, 100 U. S. 371, 376-377 (1880) held that the constitutionality of the statute creating the offense was jurisdictional and subject to review on habeas.

Ex parte Nielsen, 131 U. S. 176, 184 (1889) contains broad language regarding habeas relief for violation of a constitutional right. *Nielsen* arose out of Congress's effort to suppress polygamy in the Utah Territory. Nielsen was charged with unlawful cohabitation and with committing adultery, two punishments for the same act. *Id*., at 177-178. Despite its broad language, the actual holding of *Nielsen* is that "the writ only lies when the *sentence* exceeds the jurisdiction of the court, or there is no authority to hold the defendant under it." *Id*., at 185 (emphasis added).

Lange, *Siebold*, and *Nielsen* have two important factors in common. First, there was no other remedy, due to the lack of appellate jurisdiction. Second, the sentence itself, as opposed to the procedure for obtaining it, was claimed to be an actual miscarriage of justice. If a statute is unconstitutional, the person convicted of violating it is innocent of any crime. In multiple punishment cases, the person has already suffered the punishment for his crime.

In cases denying relief, one or both of these factors is missing. In *Ex parte Royall*, 117 U. S. 241, 250-253 (1886)

an appeal was available. In fact, the appeal was argued together with the habeas petition and decided in Royall's favor. See *Royall* v. *Virginia*, 116 U. S. 572, 584 (1886). In *Wood*, *Markuson*, and *Knewel*, the petitioners' allegations, even if true, did not establish that they were innocent or otherwise exempt from punishment. In *Matter of Moran*, 203 U. S. 96, 105 (1906), Justice Holmes disposed of a self-incrimination claim by saying it did not go to the jurisdiction of the court. *Nielsen*'s sweeping language about constitutional rights was apparently not considered controlling beyond the specific case of a sentence exceeding the maximum punishment.

The first state prisoner case to imply that a procedural claim might be considered on federal habeas after exhaustion of state remedies was *Frank* v. *Mangum*, 237 U. S. 309 (1915). There was no challenge to the constitutionality of the statute defining the crime, the jurisdiction of the court in the traditional sense, or the propriety of the punishment if the trial had been properly conducted. The claim was that the trial had been dominated by a mob and therefore not a true judicial trial. *Frank* implicitly holds that habeas relief is available for such a claim, but defers to the state court factual finding that there was no mob domination. *Id.*, at 336.

Moore v. *Dempsey*, 261 U. S. 86, 91 (1923) granted relief for mob domination of a trial. *Moore* did not, however, throw the doors open to *de novo* review of every far-fetched constitutional claim. Only three years later, Justice Holmes, writing for a unanimous court, decried the abuse of treating every claimed constitutional error as a loss of jurisdiction. *Ashe* v. *United States ex rel. Valotta*, 270 U. S. 424, 425 (1926). Federal collateral attack on state criminal judgments was a delicate matter, "and it must be realized that it can be done only upon *definitely and narrowly limited grounds*." *Id.*, at 426 (emphasis added). See also *Knewel*, *supra*, 268 U. S., at 447.

In the 1930's and 1940's, habeas corpus came to be seen as a necessary remedy for fundamental injustices which could not be corrected on direct appeal. *Mooney* v. *Holohan*, 294 U. S. 103 (1935) recognized that knowing use of perjured testimony would be subject to correction on collateral review, *id.*, at 112-113, but abstained to allow the state courts to consider the claim, *id.*, at 115.[2] In the days before discovery, it would have been virtually impossible to make a record for review of such a claim on direct appeal.

Johnson v. *Zerbst*, 304 U. S. 458 (1938), *Walker* v. *Johnston*, 312 U. S. 275 (1941), and *Waley* v. *Johnston*, 316 U. S. 101 (1942) similarly involved fundamental errors, raising strong doubts of guilt, which are not susceptible to correction on appeal. An indigent and typically uneducated defendant deprived of counsel, as in *Johnson*, cannot be expected to properly perfect his appeal. A person coerced into pleading guilty, as alleged in *Walker* and *Waley*, will probably be under the same duress not to appeal, and the duress will be off the record in any case. See *Waley*, 316 U. S., at 104-105.

Waley finally cast aside the limitation of the writ to jurisdictional questions. "It extends also to those *exceptional* cases where the conviction has been in *disregard* of the constitutional rights of the accused, and where the writ is the *only* effective means of preserving his rights." *Id.*, at 105 (emphasis added). This is still a far cry from *de novo* relitigation of every constitutional claim. "Disregard" of rights implies something more serious than the mere disagreement of coordinate courts on close questions.

These three cases, which marked the final break from jurisdictional to constitutional questions, were all federal

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2. The state supreme court later found Mooney's claims to be factually groundless. *In re Mooney*, 10 Cal. 2d 1, 85, 73 P. 2d 554 (1937), cert. denied, 305 U. S. 598.

prisoner petitions. The impetus for the change was therefore not any inability or unwillingness of state appellate courts to safeguard federal constitutional rights. It was instead a recognition that for many prisoners, federal as well as state, there would be situations where *fundamental* constitutional violations raising *grave* doubt as to the actual guilt of the defendant would go uncorrected on direct appeal. In *Ex parte Hawk*, 321 U. S. 114 (1944), the Supreme Court reiterated that relitigation following exhaustion of state remedies was reserved for cases "where resort to state court remedies has failed to afford a *full and fair adjudication*." *Id.*, at 118 (emphasis added). Congress shortly thereafter codified the exhaustion doctrine, explicitly citing *Hawk* as a correct statement of the law. Revision note to 28 U. S. C. § 2254, 415 (1988 ed.).

The notion that state prisoners should get more rather than less review, compared to federal prisoners, came quite naturally in a case involving racial discrimination: *Brown* v. *Allen*, 344 U. S. 443 (1953). The question was precisely the one which *In re Wood*, *supra*, held was not cognizable on habeas. The serious problems with this decision have been thoroughly documented elsewhere and need not be repeated here. See, *e.g.*, Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441, 499-507 (1963). Suffice it to say that for many years after *Brown* v. *Allen*, "the Supreme Court . . . continued to assume, without discussion, that it is the purpose of federal habeas corpus jurisdiction to redetermine the merits of federal constitutional questions decided in state criminal proceedings." *Id.*, at 500. This assumption was made in spite of *Brown*'s failure to "provide a principled rationalization" of such a redetermination. *Id.*, at 502. See also Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in *Wright* v. *West*, No. 91-542, at 14-16.

Supporters of unlimited relitigation assert vehemently that Congress has codified the rule stated in Justice Frankfurter's concurring opinion in *Brown*. See, *e.g.*, Brief for Senator Biden and Representative Edwards as *Amici Curiae* in *Wright* v. *West*, No. 91-542, at 1-2 ("Biden Brief"). Vehemence cannot make up for lack of authority. Only two "authorities" are cited for the codification argument. There is a claim for codification by negative implication from 28 U. S. C. § 2254(d), which deals only with state court determinations of fact and says nothing about questions of law or mixed questions. Biden Brief 9. Then there is Congress's repeated failure to get a reform bill through both houses in one session, although each house has passed reform bills at various times. Biden Brief 9-16. These are slender reeds to support such a weighty proposition.

Congress does indeed have the power to remove this question from the judiciary, but only by *passing* a bill, not by *blocking* legislation. The bicameral legislature and presidential veto were deliberately created to make legislation difficult, because the Framers considered the legislature the most dangerous branch. See *The Federalist No. 48*, at 309 (Madison) (Rossiter ed. 1961). If Congressional power brokers can divest this Court of the ability to modify its own decisions merely by blocking legislation to overturn them, a new and dangerous mode of enacting laws has been created. See *INS* v. *Chadha*, 462 U. S. 919, 946-951 (1983).

C. Nonfundamental Constitutional Claims.

As the foregoing discussion demonstrates, it is entirely appropriate for this Court to examine *why* federal habeas for state prisoners was expanded so dramatically and to curtail that expansion where it has reached into areas where those reasons do not apply. Justice Frankfurter's opinion in *Brown* was based squarely on the premise that *fundamental* rights were at stake. 344 U. S., at 507. He seems to use the terms "fundamental fairness" and

"constitutional rights" interchangeably. See *id.*, at 507-508. This view is hardly surprising, because Justice Frankfurter was the foremost advocate of the view that the Fourteenth Amendment protected *only* fundamental rights, and he vigorously opposed the "incorporation doctrine." See *Adamson* v. *California*, 332 U. S. 46, 59-68 (1947) (concurring opinion).

In the years since *Brown* and *Adamson*, federal constitutional protections for state defendants have been transformed from a few essential protections into "a detailed Code of Criminal Procedure." Friendly, *Is Innocence Irrelevant? Collateral Attacks on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 156 (1970). Yet the rule of *de novo* review was carried forward without reexamination. Appropriately enough, it was the author of *Johnson* v. *Zerbst* who sounded the alarm. At the time *Johnson* and the other cases were decided, "almost every 'constitutional right' [enforceable through habeas corpus] played a central role in assuring that the trial would be a reliable means of testing guilt." *Kaufman* v. *United States*, 394 U. S. 217, 237 (1969) (Black, J., dissenting). Imposition of the exclusionary rule on the states and an increase in federal criminal statutes caused an enormous growth in Fourth Amendment cases, and radically altered that underlying assumption. See *ibid*; *California* v. *Minjares*, 443 U. S. 916, 927 (1979) (Rehnquist, J., dissenting).

Other rules with little or no connection to the accuracy of the guilt determination followed in rapid succession. They include *Miranda* v. *Arizona*, 384 U. S. 436 (1966), the "no comment" rule of *Griffin* v. *California*, 380 U. S. 609, 615 (1965), and the endless microdissection of any jury instruction containing the word "presumed," see *Rose* v. *Lundy*, 455 U. S. 509, 541, 545 (1982) (Stevens, J., dissenting), to name just a few. While violation of these rules may be reversible error on appeal, it does not follow that they need be grounds for collateral attack. *Id.*, at 543. The suggestion that a rule recognized in this Court's

decisions as constitutional may not be fundamental may sound absurd, yet the doctrine of nonretroactivity followed by the same Court which established these rules conclusively establishes their nonfundamental character. *Id.*, at 543, n. 8; see also *Kaufman*, *supra*, 394 U. S., at 240 (Black, J., dissenting).[3]

Nonfundamental constitutional rules exist. The assumption underlying the extension of habeas review to all constitutional claims is no longer true. That is a reason to reconsider precedent. *Vasquez* v. *Hillery*, 474 U. S. 254, 266 (1986).

II. "Claims of constitutional error are not fungible."

A. Purposes of Collateral Review

There have been a number of proposals to restrict the availability of collateral review and some vehement assertions that we should leave it untouched. Each proposal for change and each opposition to change is based on assumptions about the purposes of habeas corpus. A brief review of the purposes is therefore in order.

1. Forcing courts to toe the mark.

The traditional view of the principal purpose of habeas corpus as a collateral attack is that stated by Justice Harlan in his separate opinion in *Mackey* v. *United States*, 401 U. S. 667, 687 (1971). "The primary justification given by the Court for extending the scope of habeas to all alleged constitutional errors is that it provides a quasi-

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3. Claims of "constitutional" error are limited only by the imagination of prisoners and their lawyers. In *Walker* v. *Goldsmith*, 902 F. 2d 16, 17 (CA9 1990), the Ninth Circuit actually reconsidered *de novo* a claim that jury selection procedures discriminated against people with names toward the end of the alphabet. Surely our courts have better things to do.

appellate review function, forcing trial and appellate courts . . . to toe the constitutional mark."

This function of habeas corpus was unnecessary when Congress first extended federal habeas to state prisoners. Section 2 of the same act reaffirmed the right of convicted prisoners to review of their federal questions in this Court by writ of error. Act of Feb. 5, 1867, ch. 28, § 2, 14 Stat. 385, 386-387. This right remained intact until 1916, when Congress made review of most federal questions discretionary by writ of certiorari. Act of Sept. 16, 1916, ch. 448, § 2, 39 Stat. 726-727; see Frankfurter & Landis, *supra*, at 211-213. "[W]ith the growth of the country and the attendant increase in the Court's business, it could no longer perform its historic function of correcting constitutional error in criminal cases by review of judgments of state courts and had to summon the inferior federal judges to its aid." Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 155 (1970).

This deputizing of the lower federal courts as mini supreme courts, with the power to set aside state supreme court decisions on the basis of mere disagreement, has problems of its own, however. Who is forcing the habeas courts to toe the mark? Who keeps *them* in line when they violate the right of the state to structure its criminal justice system as it sees fit, subject only to *genuine* constitutional restrictions? This Court must do so. See, *e.g.*, *Harris* v. *Pulley*, 692 F. 2d 1189 (CA9 1982), *rev'd*, 465 U. S. 37 (1984); *Adamson* v. *Ricketts*, 789 F. 2d 722 (CA9 1986), *rev'd*, 483 U. S. 1 (1987).

Yet this Court cannot take every case, and when it does not grave injustice may be committed. In *Adamson* v. *Ricketts*, 865 F. 2d 1011 (CA9 1988), cert. denied, 111 L. Ed. 2d 795, for example, federal relief was granted on the basis of disagreement with the state supreme court. The state court was correct and the federal appellate court was wrong, *Walton* v. *Arizona*, 111 L. Ed. 2d 511, 525, 110

S. Ct. 3047, 3053-3054 (1990), yet the hired killer Adamson still escapes full justice because certiorari was denied in his case.

2. Correcting fundamentally unjust incarcerations.

The oldest and most important purpose of habeas corpus is to set free those prisoners who have done nothing illegal. The celebrated *Bushell's Case*, 124 Eng. Rep. 1006 (1670), for example, freed a juror held in contempt for bringing in the "wrong" verdict. The concept of jurisdiction was first expanded beyond its usual meaning to cover cases where the defendant had been convicted of violating an unconstitutional statute and was therefore actually innocent of any crime. See *Ex parte Siebold*, 100 U. S. 371, 376-377 (1880). The early habeas cases on procedural claims involved circumstances raising grave doubt whether the defendants were actually guilty. See, *e.g.*, *Moore* v. *Dempsey*, 261 U. S. 86, 91 (1923) (mob-dominated trial).

The governing statute has long required the habeas court to "dispose of the matter as law *and justice* may require." 28 U. S. C. § 2243 (emphasis added). Thus "the imperative of correcting a fundamentally unjust incarceration," *Engle* v. *Isaac*, 456 U. S. 107, 135 (1982), is rightly assuming an increasing importance in habeas jurisprudence. See *McCleskey* v. *Zant*, 113 L. Ed. 2d 517, 544-545, 111 S. Ct. 1454, 1470 (1991) ("actual innocence" exception to abuse of the writ). Conversely, as we will describe in part B, below, use of habeas corpus to overturn fundamentally *just* incarcerations on procedural grounds is increasingly limited.

3. Giving every defendant a federal forum.

One reason often asserted against limitation of habeas corpus is the notion that every defendant should have the opportunity to litigate his federal questions in a federal forum. See, *e.g.*, Reitz, *Federal Habeas Corpus: Post-*

conviction Remedy for State Prisoners, 108 U. Pa. L. Rev. 461, 464 (1960). This position is founded on a deep distrust of state courts. *Ibid*. It asserts, in essence, that state courts are totally incompetent to adjudicate federal questions. See *Butler* v. *McKellar*, 494 U. S. 407, 430 (1990) (Brennan, J., dissenting).

Our judicial system simply is not structured that way. It has been understood from the very beginning that state courts could pass on federal questions. *The Federalist No. 82*, at 493 (Hamilton) (Rossiter ed. 1961). The desire for a federal forum, by itself, is insufficient to justify collateral attack on final convictions. A federal forum may be necessary where state remedies are grossly inadequate, as they may have been 30 years ago. See generally Reitz, *supra*. The contention that federal court resolution of every federal issue is essential today, however, is insupportable. See *Stone* v. *Powell*, 428 U. S. 465, 493, n. 35 (1976).

4. Guaranteeing perfection.

A fourth possible purpose of collateral review is to guarantee that no one is punished without a perfect trial. "But [this] Court never has defined the scope of the writ simply by reference to a perceived need to assure that an individual accused of crime is afforded a trial free of constitutional error." *Kuhlmann* v. *Wilson*, 477 U. S. 436, 447 (1986) (plurality).

The "perfect trial" view obviously cannot be accepted in its extreme form, for otherwise every case would be infinitely relitigable. If convictions are ever to be final, we must at some point accept the proposition that some claims will no longer be considered. The unanimous decision of this Court in *United States* v. *Timmreck*, 441 U. S. 780 (1979) establishes this principle unequivocally. For nonconstitutional, nonjurisdictional claims, the line is drawn at errors which "result[] in a 'complete miscarriage of justice' or in a proceeding 'inconsistent with the

rudimentary demands of fair procedure.' " *Id*., at 784. The question, then, is not *whether* to accept the possibility of imperfection, but only *where* to draw the line. There is no apparent reason why constitutional claims as a group should all be on the same side of the line.

B. Limitations on Collateral Review.

There have been many proposals for modification of the Frankfurter-*Brown* rule. Looking through the list of those adopted and those rejected, we see that the Court has consistently preserved the enforcement and correction of injustice purposes of habeas corpus. In only one unique area has a federal forum been found necessary absent a substantial connection with actual innocence.

1. Partially adopted proposals.

Several proposed limitations on federal habeas are worth mentioning for the light they shed on the broader problem. Professor Bator's extensive article, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441 (1963), is devoted primarily to demonstrating that relitigation *de novo* on federal habeas is unjustified. He concludes with a recommendation that federal habeas courts consider actual guilt or innocence as an important, if not determinative, factor in deciding whether habeas relief ought to be granted. *Id*., at 528. Judge Henry Friendly spoke more directly to the same point. He proposed that "with certain exceptions, an applicant for habeas corpus must make a colorable showing of innocence. . . " before habeas relief could be granted. Friendly, *supra*, 38 U. Chi. L. Rev., at 150.

Neither proposal has been adopted for the first federal review. For successive petitions, however, Judge Friendly's view was endorsed by a four-Justice plurality of this Court, *Kuhlmann* v. *Wilson*, 477 U. S. 436, 454 (1986), with Justice Stevens indicating that guilt or innocence should be considered in the judge's discretion, *id*. at 476-

477 (dissent), along the lines of Professor Bator's proposal. Actual innocence is now an important exception to the procedural default and abuse of the writ rules discussed *post*, at 21-22.

The partial acceptance and partial rejection of these innocence-driven proposals indicate that innocence is relevant but that there is a continuing need for the enforcement function as well. A mechanism is needed to correct state court disobedience of controlling precedent, even in the case of clearly guilty defendants.

A different but equally substantial reform was proposed by Justice Stevens in his dissent in *Rose* v. *Lundy*, 455 U. S. 509 (1982). Justice Stevens divided constitutional claims into four categories: meritless claims, harmless errors, reversible but nonfundamental errors, and fundamental errors. *Id.*, at 543-544. The last category is described primarily by examples. *Id.*, at 544, nn. 9-11. The third category includes all claims under rules which had been held nonretroactive under the since-discarded test of *Linkletter* v. *Walker*, 381 U. S. 618 (1965). *Lundy*, 455 U. S., at 543, n. 8. These claims, said Justice Stevens, should not be grounds for habeas relief *at all*. *Ibid*.

Like the Friendly and Bator proposals, this one is aimed at preserving habeas for the innocent, but in a less direct manner. It excludes by category those claims of error which are unlikely to result in the conviction of an innocent person, rather than by examining guilt or innocence in the individual case.

The separation of constitutional claims into the categories suggested by Justice Stevens would reject the notion that constitutional claims are fundamentally different as a category from other claims. Instead, constitutional claims would be subject to inquiry as to whether the claimed violation is fundamental, similar to the inquiry presently made for nonconstitutional claims. Compare *Davis* v. *United States*, 417 U. S. 333, 346 (1974) with *United States* v. *Timmreck*, 441 U. S. 780, 784 (1979).

Those not qualifying as "fundamental" would not be grounds for collateral relief. Although Justice Stevens' classification was not adopted in *Rose* v. *Lundy*, it was incorporated in the definition of an exception to nonretroactivity, discussed *post*, at 21.

2. Stone v. Powell.

Stone v. *Powell*, 428 U. S. 465 (1976) accepted the proposition advanced in Justice Black's dissent in *Kaufman* and prohibited relitigation of exclusionary rule claims already fully and fairly litigated. The first hurdle that the *Stone* Court had to clear was to recognize that "exceptions to full review might exist with respect to particular categories of constitutional claims." *Id.*, at 478-479. The dissent retorted that "there is no foundation in the language or history of the habeas statutes for discriminating between types of constitutional transgressions . . . ." *Id.*, at 522 (Brennan, J.). That statement is unquestionably wrong. Early cases did unambiguously discriminate between jurisdictional and nonjurisdictional constitutional claims, see *ante*, at 3-4, and the shift to all constitutional claims was a relatively recent development, see *ante*, at 7-8. In the 187 years from the Judiciary Act of 1789 to the *Stone* decision, habeas corpus review of *all* constitutional claims was only the law for at most 34 years: from *Waley* v. *Johnston*, 316 U. S. 101 (1942) to *Stone* v. *Powell*. In the 153 years before *Waley*, the writ had been repeatedly held to lie only for jurisdictional claims.

Once *Stone* crossed the Rubicon, the rest of the analysis was straightforward. The main reason for rejecting *de novo* review is that the exclusionary rule is actually contrary to the accuracy of the verdict. *Stone*, 428 U. S., at 490-491. Thus, avoiding injustice actually weighs against habeas review. *Id.*, at 491, n. 31. *Stone* rejects the notion that a federal forum is especially necessary in this area and expresses confidence in the state courts. *Id.*, at 493, n. 35. In this area, at least, the *Stone* Court seems confident that the threat of federal habeas review is not

necessary to make state courts "toe the constitutional mark." See *id.*, at 521 (Brennan, J., dissenting) (quoting *Mackey* v. *United States*, 401 U. S. 667, 687 (1971) (opinion of Harlan, J.)). Finally, *Stone*'s cost-benefit analysis, see *id.*, at 493, implicitly holds that the possibility of imperfection in the state proceeding does not warrant *de novo* habeas review. The conviction of a criminal on valid, probative, but illegally seized evidence is not a restraint our "society deems to be intolerable." See *id.*, at 491, n. 31 (quoting *Fay* v. *Noia*, 372 U. S. 391, 401 (1963)).

As is often noted, the *Stone* majority did say "our decision today is *not* concerned with the scope of the habeas corpus statute as authority for litigating constitutional claims generally." *Id.*, at 494, n. 37 (emphasis in original). This does not mean that the case is not relevant to creation of further exceptions, however. *Stone* does establish that *de novo* review is not required for all constitutional issues,[4] and it further sets forth some criteria for deciding which issues warrant *de novo* review. The actual decision on those issues must await appropriate cases. Such as this one.

3. Teague v. Lane.

The most important limitation on federal habeas review of state convictions came in *Teague* v. *Lane*, 489 U. S. 288 (1989). *Teague* recognized that a large category of claims exists where there is no need for the enforcement function of habeas corpus. These are cases where the petitioner seeks to apply a new rule created after the

4. *Stone* did indicate that the rule of *Mapp* v. *Ohio*, 367 U. S. 643 (1961) "is not a personal constitutional right." 428 U. S., at 486. Yet the rule must unquestionably be a constitutional rule, for there is no other legitimate basis for imposing on the states. This Court has no general supervisory power over rules of evidence in state courts. See *Estelle* v. *McGuire*, 116 L. Ed. 2d 385, 397-398, 112 S. Ct. 475, 481 (1991) (quoting *Spencer* v. *Texas*, 385 U. S. 554, 563-564 (1967)). The *Mapp* rule is either constitutionally mandated or it is wrong, and this Court has not seen fit to overrule it.

state court decision or where he seeks to create a new rule in the habeas proceeding itself. While "the threat of habeas" provides an "additional incentive" for state courts to observe "*established* constitutional standards," *id.*, at 306 (emphasis added) (quoting *Desist* v. *United States*, 394 U. S. 244, 262-263 (1969) (Harlan, J., dissenting)), no such function is served by setting aside state judgments *ex post facto* on the basis of "standards" not existing at the time of the state decision. It makes no sense to speak of forcing someone to toe a mark when that person does not know and cannot know where the mark is. See *id.*, at 306-307; cf. *Bouie* v. *Columbia*, 378 U. S. 347, 352 (1964) (retroactive expansion of scope of prohibition fundamentally unfair and unconstitutional).

Later cases have construed "new rules" broadly, thereby narrowly construing the enforcement function of habeas corpus. In *Butler* v. *McKellar*, 494 U. S. 407 (1990), Justice Brennan asserted in dissent that a narrow view of "new rules" was necessary to encourage state courts "to develop novel and more sophisticated understandings of constitutional guarantees." *Id.*, at 430, n. 37. By "more sophisticated" he apparently means more favorable to defendants and less favorable to enforcement of the criminal law. He urges, in effect, that habeas corpus should provide an incentive for state courts to err in the defendants' favor on close questions. Instead of toeing the mark, he implies, state courts should be encouraged to veer so far in defendants' favor that they avoid the area where the hidden mark might be.

The *Butler* majority rejects this notion. "The 'new rule' principle . . . validates reasonable, good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions." *Id.*, at 414. At least for questions of "pure law," *Butler* permits state courts to decide close questions honestly and

in their best judgment, without placing a thumb on the defendant's side of the scale.[5]

The *Teague/Butler* rule has exceptions, however. While the rule itself excludes from habeas corpus those issues where the enforcement purpose is weakest, the exceptions restore review for those cases where the possibility of actual injustice is strongest.

The first exception is for claims that the state cannot constitutionally punish the defendant's act. *Teague*, *supra*, 489 U. S., at 311. It also covers categorical exemptions from punishment. *Penry* v. *Lynaugh*, 492 U. S. 302, 330 (1989). This exception is substantially the same as the historical expansion of the writ in the post-Reconstruction cases. In *Ex parte Siebold*, 100 U. S. 371, 376 (1880), the petitioner claimed that Congress had no power to make his act a crime. In *Ex parte Lange*, 18 Wall. (85 U. S.) 163, 176 (1874), the petitioner was categorically exempt from the punishment imposed because he had already been punished for the offense. Penry similarly claimed that he was categorically exempt from capital punishment. 492 U. S., at 328-329.

This similarity is no accident. These cases deal with injustice of the first magnitude. If the law making the conduct criminal is unconstitutional, then the prisoner is actually innocent. An unconstitutional punishment is similarly an injustice in itself. It violates a "substantive categorical guarantee[] accorded by the Constitution, regardless of the procedures followed." *Id*., at 329.

The second *Teague* exception is for the denial of safeguards which are "central to an accurate determination of innocence or guilt" and "absolute prerequisite[s] to fundamental fairness." *Teague*, *supra*, 489 U. S., at 313-314. For this definition *Teague* relies explicitly on the injustice-relieving function of habeas corpus. *Id*., at 313.

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5. As of this writing, the question of whether *Butler* applies to "mixed questions" is before the Court in *Wright* v. *West*, No. 91-542.

The second exception corresponds to the second historical expansion of habeas corpus, and *Teague* explicitly cites the "classic grounds for the issuance of a writ of habeas corpus" to illustrate the exception. *Ibid*. (quoting *Rose* v. *Lundy*, 455 U. S. 509, 544 (1982) (Stevens, J., dissenting)).

Teague thus effectively carves out three classes of cases for special treatment. Disputes of pure law will be reviewed *de novo* on habeas corpus if they fall into categories having grave potential for actual injustice: the conviction of an innocent person, punishment beyond the maximum for the offense or the offender, or denial of the absolute essentials for a fair trial. Other disputes on abstract questions of law are reviewed only to see if the state courts were unreasonable in their conclusion. *Saffle* v. *Parks*, 494 U. S. 484, 490 (1990).

4. Procedural defaults.

Under the procedural default rule of *Wainwright* v. *Sykes*, 433 U. S. 72, 87 (1977), a claim barred in state court by failure to assert it at the proper time is also barred on federal habeas, unless the petitioner had cause for the default and suffered resulting prejudice. *Murray* v. *Carrier*, 477 U. S. 478, 496 (1986) established that even without cause and prejudice the claim would be considered if necessary to prevent an actual miscarriage of justice, i.e. if the defendant is actually innocent. *McCleskey* v. *Zant*, 113 L. Ed. 2d. 517, 544, 111 S. Ct. 1454, 1470 (1991) extended the *Sykes/Carrier* rule to claims defaulted by failure to assert them in the first federal habeas petition.

As with *Teague*, the basic rule excludes issues where the enforcement function is unnecessary, and the exception brings back in those cases where the need to correct injustice is controlling. When a state court properly refuses to consider claims defaulted without good cause, the court is not violating its duty, and there is no enforcement issue. See *Brown* v. *Allen*, *supra*, 344 U. S., at 486.

In this situation, the claim will never be litigated in a federal forum, and it is possible that one of the myriad rules of constitutional case law has actually been broken. Neither of these facts, however, is sufficient to reopen the final judgment of a court which has correctly applied the law in refusing to consider the claim. Yet a substantial probability that defendant is innocent will break down that barrier and permit consideration of the claim on the merits.

5. Racial discrimination.

There is one area where this Court has found a special need for a federal forum, even in the absence of a possibility of innocence. *Rose* v. *Mitchell*, 443 U. S. 545 (1979) rejected a call to extend the rule of *Stone* v. *Powell*, 428 U. S. 465 (1976) to claims of racial discrimination in the selection of the grand jury.

On one point, the grand jury discrimination claim is very similar to the exclusionary rule. It has no bearing on the defendant's innocence. Once a properly selected petit jury has duly found the defendant guilty beyond a reasonable doubt, the propriety of the grand jury's decision to indict him is beyond question. *Rose* v. *Mitchell*, *supra*, 443 U. S., at 586-587 (Powell, J., concurring in the judgment). However, there were two differences unique to jury discrimination claims.

First, the state judiciary itself chooses the grand jury. Instead of the usual claim where the state court sits as a neutral arbiter between prosecution and defense, in grand jury cases the state trial court adjudicates an accusation against itself. *Id.*, at 561.

Second, and perhaps more importantly, racial equality in selection of both grand and petit juries is a core constitutional right. It goes to the very heart of the Fourteenth Amendment. *Id.*, at 561-562. In sharp contrast to the recently created embellishments of the Warren Court era, it was the very first criminal procedure

right recognized after the ratification of the Fourteenth Amendment. See *Strauder* v. *West Virginia*, 100 U. S. 303, 310 (1880).

Racial discrimination is fundamentally different from all other claims. See *Powers* v. *Ohio*, 113 L. Ed. 2d 411, 427-428, 111 S. Ct. 1364, 1373-1374 (1991). A lack of public confidence in the fairness of the judicial system to racial minorities can have devastating consequences far beyond the individual case, as recent events have made all too clear. Federal review is uniquely necessary in this area. *Rose* v. *Mitchell* is correct, but its rationale does not extend beyond racial questions.

6. Harmless error.

In addition to retroactivity and the *Stone* v. *Powell* rule, constitutional claims are also treated differently when the prosecution claims that the error is harmless. In *Arizona* v. *Fulminante*, 113 L. Ed. 2d 302, 111 S. Ct. 1246 (1991), the Court was deeply divided over whether introduction of an involuntary confession was subject to harmless error analysis. Even so, the dissenters on this point readily agreed that some constitutional claims are subject to harmless error analysis and some are not. *Id.*, 113 L. Ed. 2d, at 319, 111 S. Ct., at 1253 (White, J., dissenting in part). The notion that all constitutional errors are *per se* reversible, see *Chapman* v. *California*, 386 U. S. 18, 42 (1967) (Stewart, J., concurring in the result), has completely vanished.

D. Categories of Claims.

The retroactivity cases, the harmless error cases, and *Stone* v. *Powell* together establish beyond dispute what Justice Stevens asserted in dissent in *Rose* v. *Lundy*, 455 U. S. 509, 543 (1982): "claims of constitutional error are not fungible." For example, a claim by an indigent defendant that he requested and was denied counsel is fundamentally different from a claim of a *Miranda* viola-

tion. The right to counsel was fully retroactive under the old view, *Kitchens* v. *Smith*, 401 U. S. 847 (1971), and would have been retroactive on habeas had the *Teague* rule been in effect at the time. *Saffle* v. *Parks*, 494 U. S. 484, 495 (1990). *Miranda* itself was not retroactive, *Johnson* v. *New Jersey*, 384 U. S. 719, 721 (1966), and extensions of it have not been retroactive on habeas in the new regime *Butler*, *supra*, 494 U. S., at 416. The *Fulminante* majority concedes that denial of counsel is not subject to harmless error analysis, 113 L. Ed. 2d., at 331, 111 S. Ct., at 1265, while the dissent concedes that *Miranda* claims lack the "distinctive reasons" underlying its opposition to harmless error analysis, 113 L. Ed. 2d, at 320, n. 7, 111 S. Ct., at 1256.

Thus the degree to which the law is willing to tolerate imperfection varies from one rule to the next. The importance of the rule is weighed against the costs of overturning past proceedings for errors which were not errors at the time or which made no real difference in the outcome.

A similar weighing is in order to decide whether the possibility of imperfection with regard to a particular rule justifies the very substantial costs of relitigation *de novo* on habeas corpus. See *Stone* v. *Powell*, *supra*, 428 U. S., at 491, n. 31. Where the rule is essential to an accurate determination of guilt or to public confidence in fairness of the system, such review may be necessary. For a rule which involves neither of these concerns and which merely erects a protective buffer zone around a constitutional right, *amicus* submits that the cost of relitigation is unjustified.

III. *Miranda* claims fully and fairly litigated in state court need not be relitigated on federal habeas corpus.

The critical question of this case is whether the state court's determination of when Williams was "in custody,"

so as to trigger the requirement for *Miranda* warnings, should be ignored. See *Williams* v. *Withrow*, 944 F. 2d 284, 288-289 (CA6 1991). Should this issue come under the rule that "a federal court will not ordinarily re-examine upon writ of habeas corpus the questions thus adjudicated"? *Ex parte Hawk*, 321 U. S. 114, 118 (1944). Or should it instead be governed by the assertion that "no binding weight is to be attached to the State determination"? *Brown* v. *Allen*, 344 U. S. 443, 508 (1953) (opinion of Frankfurter, J.). For *Miranda* claims, *amicus* submits that the *Hawk* rule is correct and should be restored.

The rules set forth in *Miranda* v. *Arizona*, 384 U. S. 436 (1966) are not found in the Constitution. *Miranda* is a prophylactic rule, judicially created to build a buffer zone around the Fifth Amendment right. See *McNeil* v. *Wisconsin*, 115 L. Ed. 2d 158, 167, 111 S. Ct. 2204, 2208 (1991). A violation of *Miranda* or its progeny does not mean that a defendant has actually been "compelled to be a witness against himself." Cf. U. S. Const. amend V. Indeed, in many *Miranda* cases it is quite clear that there was no compulsion. See *Minnick* v. *Mississippi*, 112 L. Ed. 2d 489, 501, 111 S. Ct. 486, 494 (1990) (Scalia, J., dissenting). *Miranda* is thus a step removed from the text of the Constitution.

Miranda is also far removed from the question of the accurate determination of guilt or innocence. A confession extracted through brutality may very well result in the conviction of an innocent person. See, *e.g.*, *Fay* v. *Noia*, 372 U. S. 391, 394-396 (1963), overruled on other grounds in *Coleman* v. *Thompson*, 115 L. Ed. 2d 640, 669, 111 S. Ct. 2546, 2565 (1991). Few people have the stamina to maintain innocence under torture. The mere failure to give warnings before asking questions, in contrast, is extremely unlikely to extract a false confession.

Unlike racial discrimination, there is no century-long history of state court resistance to *Miranda*. Cf. *Rose* v. *Mitchell*, 443 U. S. 545, 558-559 (1979). While the imple-

mentation may have been slow initially, the *Miranda* rule is now fully integrated into state procedures. Indeed, a substantial portion of this Court's recent *Miranda* cases have been reversals of state courts which extended the *Miranda* rule too far. See, *e.g.*, *California* v. *Beheler*, 463 U. S. 1121 (1983); *New York* v. *Quarles*, 467 U. S. 649 (1984); *Oregon* v. *Elstad*, 470 U. S. 298 (1985); *Pennsylvania* v. *Bruder*, 488 U. S. 9 (1988); *Illinois* v. *Perkins*, 110 L. Ed. 2d 243, 110 S. Ct. 2394 (1990).

The rule does not involve "discrete and insular minorities," see *United States* v. *Carolene Products*, 304 U. S. 144, 153, n. 4 (1938), with special needs for federal protection. The conviction of a defendant who is, in fact, guilty and who did, in fact, confess voluntarily is unlikely to cause a breakdown in public confidence in the judicial system, regardless of the merits of the *Miranda* claim.

A federal court which declines to reexamine a *Miranda* question accepts the possibility that a defendant may be convicted despite a *Miranda* violation. We are not here concerned with a violation of a bright-line rule so clear that reasonable judges cannot differ. We are only concerned with a case in the gray zone that surrounds the buffer zone that *Miranda* erected around the Fifth Amendment—a case, in other words, at least *two* steps removed from the core constitutional right.

Is imprisonment under such a conviction a restraint which our society deems intolerable? See *Fay* v. *Noia*, *supra*, 372 U. S., at 402. On the contrary, noncompliance with *Miranda* has been tolerated in many cases. Sylvester Johnson's sentence of death was upheld despite a lack of *Miranda* warnings for his confession. *Johnson* v. *New Jersey*, 384 U. S. 719 (1966). The cost of "seriously disrupt[ing] the administration of our criminal laws" was sufficient to outweigh the need for retroactive enforcement of *Miranda*. *Id.*, at 731. Horace Butler's sentence was also tolerable. *Butler* v. *McKellar*, 494 U. S. 407, 416 (1990). The violation of a prophylactic rule was insufficient reason to allow a repeated challenge to the well-deserved sentence of a rapist-murderer whose confession was, in fact, voluntary. The failure of the police to give the *Miranda* warnings has been found tolerable in a variety of situations. See *Harris* v. *New York*, 401 U. S. 222, 226 (1971) (use for impeachment); *Michigan* v. *Tucker*, 417 U. S. 433, 437-438 (1974) (discovery of third-party witness); *New York* v. *Quarles*, *supra*, 467 U. S., at 653 (public safety need for immediate answer); *Oregon* v. *Elstad*, *supra*, 470 U. S., at 304 (unwarned confession does not "taint" subsequent confession).

Presuming the historical facts to be as the trial court found them, see Resp. Brief Opp. 5-6; 28 U. S. C. § 2254(d), the state court ruling that defendant was not in custody when he made his unwarned statement is reasonable. Given the similarity of the situation to *California* v. *Beheler*, *supra*, 463 U. S., at 1122, one cannot say that the state court acted with "disregard" of defendant's constitutional rights. See *ante*, at 7.

The mere possibility that the state court erred in resolving a close question on the application of *Miranda* to specific facts is not so intolerable to our society that we must bear the delay and expense of relitigating such questions *de novo*. State courts are competent to adjudicate such questions, and when they have done so reasonably and conscientiously, mere disagreement with the result is insufficient reason for collateral attack.

IV. The voluntariness claim should be remanded for further proceedings on exhaustion and procedural default.

In addition to the *Miranda* claim, the Sixth Circuit also affirmed a grant of habeas relief on the question of actual coercion. *Williams* v. *Withrow*, 944 F. 2d 284, 290 (1991). In *Miller* v. *Fenton*, 474 U. S. 104, 112 (1985), this Court held that such questions would be reconsidered *de novo*

on federal habeas corpus. *Amicus* does not suggest reopening that question,[6] and this would not be a proper case for a "fully and fairly litigated" limitation in any event. It is plain on the face of Williams' statement of the case that no such claim has been presented to the state courts.

Williams was successful in the state trial court in obtaining suppression of some of the statements on independent state grounds. Resp. Brief Opp. 5-6. On appeal, Williams made two arguments "[w]ith respect to the confession issue." *Id.*, at 7. One was based on state law. *Ibid.* The *only* federal question presented regarding the confession, Williams' brief tells us, was the argument that "he was in 'custody' for the purpose of receiving these rights," i.e. the *Miranda* warnings, prior to the time he was actually warned. *Ibid.*

Where a claim has never been "fairly presented" to the state courts there are only two possibilities: it is either unexhausted or it is procedurally barred. See *Castille* v. *Peoples*, 489 U. S. 346, 351 (1989). If it is unexhausted, the petition must be dismissed. *Rose* v. *Lundy*, 455 U. S. 509, 522 (1982).[7] If it is procedurally barred, habeas relief must be denied unless Williams can qualify for one of the exceptions. See *Dugger* v. *Adams*, 489 U. S. 401, 406-407 (1989).

These questions turn on issues of state law and case-specific facts, both of which are inappropriate for resolu-

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6. As noted earlier, *ante*, at 25, voluntariness of confessions has a substantial connection with actual innocence.

7. The Sixth Circuit claims the state conceded exhaustion in oral argument. 944 F. 2d, at 288, n. 1. The state says it only conceded exhaustion on the *Miranda* issue, not the voluntariness issue. Pet. Cert. 20. Where nonexhaustion is patent, and the supposed concession is ambiguous at best, *amicus* submits that the exhaustion rule should be enforced. See *Granberry* v. *Greer*, 481 U. S. 129, 134 (1987) (consider interests of comity and federalism).

tion in this Court on certiorari. Reversal and remand are appropriate. See *Castille*, *supra*, 489 U. S., at 352.

CONCLUSION

The decision of the Court of Appeals for the Sixth Circuit should be reversed. The case should be remanded for determination of the exhaustion procedural default question on the voluntariness claim.

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Respectfully submitted,

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